KOMOCO MOTORS PTE LTD

v.

FARIDAH ABDULLAH

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG J
[CASE NO: 23NCvC-151-2011]
20 APRIL 2010

CONTRACT: *Sale and purchase of land - Specific performance - Sale and purchase subjected to restriction in interest - Whether conditions complied within stipulated time - Whether sale and purchase agreement existed between parties - Whether enforceable - Whether doctrine of laches and acquiescence applied*

The plaintiff, a private limited company registered in Singapore and the defendant, a Singaporean citizen, had entered into a sale and purchase agreement ('SPA') dated 24 February 2003 for the sale of a property ('the property') situated in Johor for the price of RM1,500,000. The property was subjected to an express restriction in interest that it could not be sold or transferred to a non-Malaysian citizen without the consent of the State Authority. The SPA was also conditional upon the plaintiff obtaining approvals from of the foreign investment committee ('FIC') and the State Authority within the stipulated time. The plaintiff subsequently obtained the relevant approvals but there were errors on both the documents. The defendant raised the issue of *non est factum*, denied entering into the SPA with the plaintiff and contended that even if the SPA existed, it was invalid as the defendant did not receive any consideration. The defendant further contended that the plaintiff had not obtained the relevant approvals and even if it did, it was obtained out of time and that the doctrine of laches and acquiescence operated against the plaintiff. The plaintiff claimed for an order for specific performance of the SPA since it was able and willing to complete the purchase of the property.

Held (dismissing plaintiff's claim with cost):

(1) As a rule, the plea of *non est factum* should be pleaded in the statement of defence. However, on the facts, the issue of *non est factum* was not pleaded in the defendant's statement of defence and was therefore rejected. There was no evidence to

show whether the plaintiff acted with reasonable care when it signed the SPA. Therefore the parties had indeed entered into the SPA. (para 21)

(2) The defendant's contention that she did not receive the deposit from the plaintiff contradicted with the acknowledgement clause in the SPA as the deposit was to be paid to the plaintiff's solicitors as stakeholders. The SPA provided that the balance purchase price was subjected to compliance of the defendants to deliver the transfer together with certified true copies of the quit rent and the assessment receipts to the plaintiff's solicitors as stakeholders. Since the defendant had failed to do so, the plaintiff's obligation to pay the balance purchase price did not materialise and therefore there was no failure to pay the balance purchase price on the part of the plaintiff. (paras 21, 28 & 30)

(3) The failure to call the FIC and State Authority officers to explain the discrepancies in the State Authority's consent and the FIC's approval showed that the plaintiff did not obtain the relevant approval and consent as required under the SPA. The application for FIC approval was made three years after the SPA and the application for the State Authority consent was made after about two years and five months. The plaintiff gave no explanation about the delay. In the circumstances, FIC's approval and the State Authority consent were not obtained within a reasonable time. (paras 33 & 36)

(4) The conduct of the plaintiff had been tainted with lack of prudence and discretion. Even if the plaintiff's case had been made, it would have been not equitable for a decree of specific performance to be made in favour of the plaintiff. In the circumstances, this was a proper case for the doctrine of laches to be applied against the plaintiff due to delay of eight years since the lapse of the SPA and acquiescence on the part of the plaintiff. (paras 43 & 44)

Case(s) referred to:

Ahmad Salleh & Ors v. Rawang Hills Resort Sdn Bhd [1995] 4 CLJ 197 HC ***(refd)***

Berry v. British Transport Commission [1961] 3 WLR 450 ***(refd)***

Bumiputra Lloyds Leasing Bhd v. Sykt Teknomewa Sdn Bhd & Ors [1990] 2 CLJ 23; [1990] 1 CLJ (Rep) 684 HC ***(refd)***

Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(dist)***
HA Securities Sdn Bhd v. Ng Kong Yeam [1993] 4 CLJ 433 HC ***(refd)***
Hassan v. Ismail [1970] 1 LNS 35 FC ***(refd)***
Lii Tat Credit & Mortgage Sdn Bhd v. Tang Liing Kang [1988] 3 MLJ 104 ***(refd)***
Lindsay Petroleum Co v. Hurd (1874) LR 5 PC 221 ***(refd)***
Loo Choo Teng & Anor v. Cheok Swee Lee & Ors [2000] 2 CLJ 389 CA ***(refd)***
Lysaght v. Edward (1876) 2 Ch D 499 ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***
MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd [2010] 1 CLJ 36 CA ***(refd)***
National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Ratnavale Nee Annalakshmi Vattivelu & Anor v. Lourdenadin [1988] 2 SCR 161 ***(refd)***
Sang Lee Company Sdn Bhd v. Suburamaniam Mayawan & Ors [2011] 1 CLJ 167 CA ***(dist)***
Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) v. Anglia Building Society [1970] 3 All ER 961 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***
So Ka Soong lwn. Bank Kerjasama Rakyat (M) Berhad & 2 Lagi [1996] 1 CLJ 783 HC ***(refd)***
Zainal Abidin Jawi v. Mat Hassan Abdul & Anor [1988] 1 CLJ 384; [1988] 2 CLJ (Rep) 575 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101(1), 102, 114
Limitation Act 1953, s. 32

For the plaintiff - Zulkiflee Othman (Vasanthi Vadiveoo with him); M/s Syed Alwi, Ng & Co
For the defendant - Ng Chew Hor; M/s Ng, Fan & Assocs

Reported by Sandra Malani Gabriel

JUDGMENT

Vernon Ong J:

[1] The plaintiff's claim is for specific performance of a sale and purchase agreement under which the defendant agreed to sell a bungalow to the plaintiff.

A **Brief Account Of The Facts**

[2] The plaintiff is a private limited company registered in the Republic of Singapore. The defendant is a Singapore citizen and is the registered owner of a piece of land held under H.S.(D) B 194305 Lot PTD 58625 Mukim Pulai Daerah Johor Bharu State of Johor Darul Takzim with a bungalow bearing address No. 8, Jalan Merpati Satu, Leisure Farm, Gelang Patah, Johor ('the property'). The property is subject to an express restriction in interest in that it cannot be sold or transferred in any manner C whatsoever to a non-Malaysian citizen without the consent of the State Authority.

The Plaintiff's Case

[3] Pursuant to a sale and purchase agreement dated D 24 February 2003 ('the SPA') the plaintiff agreed to purchase and the defendant agreed to sell to the property for the purchase price of RM1,500,000. The plaintiff paid RM150,000 as deposit and RM30,000 earnest money to the plaintiff's solicitors as stakeholders. The plaintiff has obtained the FIC approval and the E consent of the State Authority. The defendant has refused to comply with the terms and conditions of the SPA. The plaintiff is claiming for an order for specific performance of the SPA, an order to compel the defendant to deliver up the original issue document of title to the property and other consequential orders.

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The Defendant's Defence

[4] The defendant denies entering into the SPA. Instead, the defendant entered into a sale and purchase agreement with another company Komoco Investment Pte Limited (Co. No. G 199203603Z) ('KIPL') on 24 February 2003. However, the said agreement was aborted as the defendant did not receive any consideration.

[5] In the alternative, the defendant contends that even if the H SPA exists, the SPA is invalid and unenforceable as (i) she did not receive any consideration under it and (ii) the plaintiff did not obtain the approvals of the State Authority and the FIC. Consequently, the defendant terminated the sale and purchase agreement *vide* the defendant's solicitor's letter dated 17 August I 2009.

[6] Further, the terms relating to the obtaining of consent from the State Authority and the FIC is unenforceable because of uncertainty. The plaintiff also failed to apply for and obtain the State Authority consent and FIC approval within a reasonable period. Therefore, the SPA is invalid and unenforceable.

[7] The defendant admits that the property has been let out to a third party. Lastly, it is pleaded that the doctrine of laches and acquiescence operates against the plaintiff and the plaintiff's claim is also time barred.

Overview Of The Evidence

[8] The plaintiff called three witnesses: Mr. Patrick Ee Tian Huat (PW1) a lawyer practising in Singapore, Mr. Gopal Krishna Pillay (PW2) the managing director, and Mr. Lim Boon Keong (PW3) an advocate and solicitor. In rebuttal, the defendant (DW2) gave evidence under oath and called Mr. Teh Soo Chye (DW1) an advocate and solicitor.

[9] PW1 said that the plaintiff asked him to act for the defendant for the sale and purchase of the property. He attested the signatures of both parties in the SPA. PW1 said that the sale and purchase agreement did not materialise as the defendant had failed to deliver certified true copies of the quit rent and latest assessment receipts together with the issue document of title to the plaintiff's solicitors. PW1 subsequently discharged himself from acting for the defendant around 7 September 2009.

[10] PW2's evidence was relatively brief. Apart from the fact that he knew the defendant and met the defendant before, the remainder of his evidence is inconsequential to the case.

[11] PW3 an advocate and solicitor, acted for the plaintiff in the SPA transaction. He said that the plaintiff paid the 10% deposit to his firm as stakeholders. The earnest money and the deposit has not released to the defendant because he was instructed not to release it until the completion of the SPA. The plaintiff obtained the FIC consent on 27 March 2006 and from the State Authority on 20 January 2009. The plaintiff refused to pay the balance purchase price as the defendant has refused to forward the issue document of title to him. PW3 requested the defendant to forward the requisite documents to effect the transfer of the

property. The defendant told him that she was forced to enter into the sale and purchase agreement and ask whether the plaintiff would consider paying her some extra amount. On 10 August 2009 PW3 wrote to Messrs SC Teh & Azura asking for the defendant to deliver up the said documents failing which the plaintiff would apply for specific performance. At the some time, PW3 also wrote to PW1 with an update. Subsequently, PW3 received a letter from Messrs SC Teh & Azura terminating the SPA. On 7 September 2009, PW3 replied stating that PW1 had discharged himself from acting for the defendant.

[12] DW1 said that the defendant came to see him about the notice to quit dated 4 September 2008 issued by PW3. On 14 October 2008, DW1 wrote to PW3 asking for copies of the sale and purchase agreement and other documents. DW1 did not receive any reply from PW3. A reminder was issued on 4 December 2008. Sometime in July 2009, DW1 received a call from PW3 asking for the title deed; PW3 followed his request in writing on 28 July 2009. On 28 July 2009, PW3 wrote to DW1 enclosing a copy of the sale and purchase agreement and intimated that the plaintiff wanted to complete the transfer and settle the purchase price. On 17 August 2009, DW1 replied stating that the defendant have not met or appointed PW1. DW1 said that he did not receive PW3's letter dated 10 August 2009.

[13] The defendant denied entering into the SPA. She did not appoint PW3 to act for her in that transaction. She denied signing the SPA. She did not receive any payment from the plaintiff. She did not have any knowledge of the applications for the FIC and State Authority approvals. She executed a sale and purchase agreement with KIPL. However, the transaction did not materialise as no further action had been taken nor any payments made to her by KIPL. After she received the notice to quit, she appointed Messrs. SC Teh & Azura to act for her.

Findings Of The Court

[14] It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential

burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish their case. If they fail to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (*Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; s. 102 of the Evidence Act 1950).

[15] In this case the principal issues to be determined relate to whether there was a sale and purchase agreement between the plaintiff and the defendant for the sale of the property, and if so, whether the plaintiff is entitled to specific performance of the SPA?

Issues To Be Tried

Whether There Was A Sale And Purchase Agreement Between The Plaintiff And The Defendant For The Sale Of The Property?

[16] One clear fact emerged from the evidence at the trial. It is that there was a sale and purchase agreement which was executed by the defendant for the sale of the property for RM1.5 million.

[17] What is in dispute, however, is the identity of the purchaser under the SPA. The plaintiff contends that it is the purchaser whereas the defendant contends that the purchaser is KIPL.

[18] According to PW3 who prepared the sale and purchase agreement, KIPL was stipulated as the purchaser. PW3 forwarded the sale and purchase agreement to PW1 for PW1 to attend to the execution by the defendant. However, when the duly executed SPA was returned to PW3, KIPL's name was substituted with that of the plaintiff's.

[19] Under cross-examination, the defendant said that she did not read through the SPA because she was going through a divorce; so she just looked at the front page of the SPA and signed it. Her ex-husband brought the SPA for her to sign. She was not aware that under the SPA the deposit had been paid by the plaintiff to the plaintiff's solicitors as stakeholders. She did not receive any payment from the plaintiff and that she did not have any knowledge about the payment of the deposit. What the defendant is implying is that she is not bound by the SPA as she only look at the front page and did not read it - this is the plea of *non est factum*.

Doctrine Of Non Est Factum

[20] *Non est factum* is a old common law defence. It arises when a person signs a deed or other legal documents without reading it and afterwards it turns out to be an entirely different transaction from what he thought it was. He then comes to court and claims that he is not bound by it and that the deed is not his deed. The law on this subject has been considered by Lim Beng Choon J in *Zainal Abidin Jawi v. Mat Hassan Abdul & Anor* [1988] 1 CLJ 384; [1988] 2 CLJ (Rep) 575, by Chong Siew Fai J (as he then was) in *Lii Tat Credit & Mortgage Sdn Bhd v. Tang Liing Kang* [1988] 3 MLJ 104, by Zakaria Yatim J (as he then was) in *Bumiputra Lloyds Leasing Bhd v. Sykt Teknomewa Sdn Bhd & Ors* [1990] 2 CLJ 23; [1990] 1 CLJ (Rep) 684, by James Foong J (later FCJ) in *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640 and by Mohd Ghazali Mohd Yusoff J (as he then was) in *So Ka Soong lwn. Bank Kerjasama Rakyat (M) Berhad & 2 Lagi* [1996] 1 CLJ 783. Suffice it to say that the plea must be based on clear and uncontroverted evidence. This plea is not open to anyone who was content to sign without taking any trouble to find out the general effect of the document. The onus is on the defendant who seeks to disown the documents she signed. She must show the following circumstances: (i) that she acted with reasonable care when she signed the documents; and (ii) that the documents she signed were fundamentally different from what they thought it was (see Lord Reid's judgment in *Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) v. Anglia Building Society* [1970] 3 All ER 961, 963). In short, the defendant must show that she exercised reasonable care when she executed the documents; this is a question of fact to be determined on the evidence. If she chose to be careless or did not bother to find out about the contents therein, she must be taken to have known the nature and content of the documents she signed.

[21] As a rule, the plea of *non est factum* should be pleaded in the statement of defence. In this case *non est factum* was not pleaded. Even if it was pleaded, the court finds that the defendant's answers to be ambivalent. On the one hand, she admitted that she signed the SPA. She knew that it was for the sale of the property at RM1.5 million. At the same time, she professed not to know what she signed; giving the excuse that she did not read the SPA before signing it. Apart from her signature on the execution page, her initials appears on every page of the SPA. This indicates that

she must have gone through every page of the sale and purchase agreement which contradicts her evidence that she only looked at the front page. Her evidence that she did not receive any payment from the plaintiff is also contradicted by the fact that under cl. 2.1, the deposit was paid to the plaintiff's solicitors as stakeholders. The defendant also came across as a person who is literate and who knew what she was doing when she signed the SPA. There was no evidence to show that the defendant acted with reasonable care when she signed the SPA. Further, the SPA she signed was also a sale and purchase agreement for the sale of the property at the price of RM1.5 million. Accordingly, on the balance of probabilities, the court finds that the defendant must be taken to have known the nature and content of the SPA she signed. For the foregoing reasons, the court finds that there was a sale and purchase agreement between the plaintiff and the defendant for the sale of the property, which agreement is contained in the SPA.

Whether The Plaintiff Is Entitled To Specific Performance Of The SPA?

[22] The gist of the plaintiff's case is that the defendant breached the SPA because (i) she failed to deliver up the transfer in favour of the plaintiff together with certified true copies of the quit rent receipt, latest assessment receipts and any other documents to the plaintiff's solicitors after the deposit had been paid; and (ii) she wrongly terminated the sale and purchase agreement on 17 August 2009.

[23] The defendant's reply may be summarised as follows:

(i) she did not receive any payment under the SPA;

(ii) the plaintiff did not obtain the FIC approval and State Authority consent;

(iii) the terms on FIC approval and State Authority consent are vague and unenforceable;

(iv) the plaintiff failed to obtain the approvals within a reasonable time;

(v) the doctrine of laches and acquiescence operates the plaintiff; and

(vi) the plaintiff's claim is time barred.

[24] Before proceeding to consider the issues, it would be helpful to set out a chronology of the key events in the table below.

Chronology of Key Events	
Date	**Remarks**
24 February 2003	SPA executed.
27 March 2006	FIC approval obtained.
4 September 2008	Plaintiff's solicitors issued notice to quit to occupiers of property.
14 October 2008	Defendant's solicitors write about letter to quit to plaintiff's solicitors and asked for copies of SPA and copies of all other relevant documents.
4 December 2008	Defendant's solicitors issue reminder.
20 January 2009	State Authority consent obtained.
28 July 2009	Plaintiff's solicitors reply attaching copy of SPA only.
17 August 2009	Defendant's solicitors write to plaintiff's solicitors stating that defendant never met PW1, deny validity of SPA and alternatively, terminating SPA.
7 September 2009	Plaintiff's solicitors reply denying defendant's allegations. Informs that FIC and State Authority consent obtained. Notifies that legal proceedings will be taken out for specific performance.

[25] The plaintiff maintains that it has paid RM150,000 as deposit and RM30,000 as earnest money to the plaintiff's solicitors as stakeholders, which payment was acknowledged by the defendant under cl. 2.1. The SPA is conditional upon obtaining the approvals of the FIC and the State Authority. FIC approval was obtained on 27 March 2006 followed by the State Authority consent on 20 January 2009. As the plaintiff is able and willing to complete the purchase of the property, the plaintiff is entitled to an order for specific performance of the SPA (*MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd* [2010] 1 CLJ 36 (CA)). Further, the plaintiff is entitled to recover the rental received by the

defendant for the rental of the property as the plaintiff is the beneficial owner of the property (*Ahmad Salleh & Ors v. Rawang Hills Resort Sdn Bhd* [1995] 4 CLJ 197; [1995] 3 MLJ 211; *Lysaght v. Edward* (1876) 2 Ch D 499; *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67; [1976] 2 MLJ 53 (FC)).

Whether The Defendant Received Any Consideration Under The Sale And Purchase Agreement?

[26] The defendant's contention is that she did not receive any consideration under the SPA (paras. 3 & 6 of the statement of defence). The first point of this contention relates to the deposit - learned counsel for the defendant argued that the defendant is entitled to prove that she did not receive the deposit (*Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290 (FC)). Further, as there was no documentary evidence to show that payment of the deposit was made the plaintiff's evidence that the deposit was paid by telegraphic transfer should be rejected (*Sang Lee Company Sdn Bhd v. Suburamaniam Mayawan & Ors* [2011] 1 CLJ 167; [2011] 5 MLJ 374 (CA)). Learned counsel also invited the court to invoke an adverse inference under the illustration (g) of s. 114 of the Evidence Act 1950 on account of the failure to produce any documents in relation to the telegraphic transfer of the deposit. Secondly, it was also contended that there is also no evidence to show that the plaintiff has paid the balance of the purchase price to its solicitors by the payment deadline as defined under cl. 1.1.8; which payment deadline expired on 19 April 2009 and extended payment deadline expired on 19 May 2009. Clause 2.2 clearly stipulates that the plaintiff shall pay the balance purchase price to its solicitors as stakeholders on or before the payment deadline.

[27] In *Ganam*, *supra* the sale and purchase agreement contained an acknowledgement clause by the plaintiff/vendor of the receipt of the deposit of RM10,000 from the defendant/purchaser at the time of the signing of the contract. In that case, the defendant's version was that the deposit was paid to and received by the plaintiff's agent, Perumal as evidenced by a cheque. Perumal admitted receiving the cheque and cashing it the following day at the defendant's request. Perumal also said that he handed the deposit back to the defendant after cashing the cheque; but this was denied by the defendant. The trial judge rejected Perumal's testimony and found that the plaintiff had received the deposit. The Federal Court held that the plaintiff was entitled to give oral

A evidence to say that she did not in fact receive the deposit of RM10,000. Since the plaintiff had expressly denied receiving the deposit from the defendant and in the absence of any evidence that the plaintiff received the deposit, the inference that the plaintiff received the deposit could not be supported. The Federal
B Court also said that it was not sufficient to show that the deposit was paid to Perumal as agent of the plaintiff. The trial judge ought to have gone further and considered whether or not the defendant had discharged the onus of proving that Perumal, as agent had authority to receive the deposit on behalf of the plaintiff.

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[28] The facts of *Ganam*, *supra* are distinguishable on the facts. In the present case, the acknowledgement of receipt clause in the SPA provides that the deposit was paid to the plaintiff's solicitors as stakeholders. The defendant's assertion that she did not receive
D the deposit is immaterial as it runs counter to the acknowledgement clause in the SPA. PW3 testified that the plaintiff had paid the deposit to his firm by telegraphic transfer. The fact that PW3 could not produce any receipt or documents to prove the payment of the deposit does not support the
E defendant's contention that she did not receive the deposit. *Sang Lee*, *supra* is also distinguishable on the facts as in that case, the plaintiff's evidence of payment of the monies to the defendant was made under an oral agreement; whereas in this case there is a formal sale and purchase agreement and an acknowledgement of
F receipt clause.

(Adverse inference under illustration (g) of s. 114 Evidence Act 1950)

[29] Before drawing any presumption of fact, the court must
G carefully consider the circumstances in order to ascertain whether there are adequate grounds to justify any presumption being raised. This presumption of law is only invoked where its use is strictly necessary for the ends of justice (per Devlin LJ said in *Berry v. British Transport Commission* [1961] 3 WLR 450 at 463).
H In determining this issue the question to consider is whether the existence of a given fact or a state of things makes the existence of another fact or a state of things so likely that it may be presumed to exist. Illustration (g) of s. 114 is not mandatory, but depends on the circumstances of the case and, particularly in the
I materiality of the documents or witnesses not produced. It may be drawn from withholding not just any document, but material

document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case. In this instance, there is nothing to show that the plaintiff had withheld or suppressed any evidence at the trial. Accordingly, the court is not inclined to invoke the presumption of adverse inference against the plaintiff.

[30] The defendant's second bone of contention that the balance purchase price was not paid is also misconceived. It is clearly provided in cl. 2.2 that such payment shall be subject to compliance by the defendant's obligations to deliver the transfer together with certified true copies of the quit rent and assessment receipts to the plaintiff's solicitors as stakeholders under cl. 3.1. As the plaintiff's case is that the defendant has failed to fulfil that obligation, the plaintiff's obligation to pay the balance purchase price did not materialise. Consequently, there was no failure to pay the balance purchase price on the part of the plaintiff.

Whether The Plaintiff Obtained The FIC Approval And State Authority Consent; And If So, Whether The Terms Of The FIC Approval And State Authority Consent Are Vague And Unenforceable?

[31] In this case, there are apparent discrepancies on the face of both the FIC approval letter and the State Authority consent letter. The State Authority consent letter refers to a sale and purchase agreement dated 24 February 2006; which differs from the date of the SPA which is 24 February 2003. The FIC approval letter refers to one 'Komoco Holdings Pte Limited' instead of the plaintiff. The plaintiff concedes that these discrepancies exist but attribute them to being typographical errors.

[32] With respect, the plaintiff's explanation is speculative and vague. Both documents are official letters which are required in order to enable the SPA to go through; without these documents the registration of the ownership in the property from the defendant to the plaintiff would have been rejected by the land registry. The discrepancies could have easily been clarified had the makers of those documents being called. But they were not called and the plaintiff did not give any reason why they did not call the officers from the FIC and the State Authority to testify.

[33] Without the benefit of any explanation or clarification on the discrepancies, these documents can only be taken at face value: (i) the State Authority consent was given to one 'Komoco Holdings Pte Limited' and not to the plaintiff; and (ii) the FIC

approval was granted for a sale and purchase agreement dated 24 February 2006 and not the SPA. By reason of the foregoing, the court finds that the plaintiff did not obtain the necessary FIC approval and the State Authority consent which were required under the SPA. In the light of this finding, it is not necessary to go into the question of whether the terms of the FIC approval and the State Authority consent are vague and unenforceable.

Whether The FIC Approval And State Authority Consent Were Obtained Within A Reasonable Time?

[34] Even if the necessary FIC approval and State Authority consent had been obtained, were they obtained within a reasonable time? The FIC application was made on 17 March 2006, about three years after the SPA. The application to the State Authority was made on 28 August 2008 - a lapse of about two years and five months; this delay contravened cl. 9 which requires the State Authority application to be made upon receipt of the FIC approval, ie, on or about 27 March 2006.

[35] The plaintiff concedes that there was a lapse of time in making the applications to the FIC and the State Authority. However, it contends that the delay in making the applications did not amount to a breach of the terms of the SPA because the plaintiff had the option under cls. 8.2 and 9.2 to exercise its rights not to terminate the SPA and to continue with the terms therein. In other words, time becomes at large at the option of the plaintiff.

[36] In the aforesaid circumstances, it is clear that the applications to the FIC and the State Authority were made only after a period of inordinate delay. Therefore, it is incumbent upon the plaintiff to explain the delays. However, no explanation was forthcoming from the plaintiff. Accordingly, the court is driven to the conclusion that the FIC approval and State Authority consent were not obtained within a reasonable time.

Whether The Doctrine Of Laches And Acquiescence Operates Against The Plaintiff; And Whether The Plaintiff's Claim Is Time Barred?

[37] Learned counsel for the defendant argued that the plaintiff is guilty of laches and a decree of specific performance should not be granted. By the time the notice to quit dated 4 September 2008 was issued, the plaintiff would have realised that the defendant did not agree to the SPA. The State Authority consent

had lapsed on 19 July 2009. Further, this action was only filed on 29 July 2011; a further delay of two years nine months. Altogether, there had been a lapse of eight years five months between the date of the SPA and the filing of this action (*HA Securities Sdn Bhd v. Ng Kong Yeam* [1993] 4 CLJ 433; [1993] 3 MLJ 489; *Ratnavale Nee Annalakshmi Vattivelu & Anor v. Lourdenadin* [1988] 2 SCR 161).

[38] In reply, learned counsel for the plaintiff submitted that even though the State Authority consent has lapsed, the court has the discretion to grant an order for specific performance and a further order for renewal on the expired consent; until the final decision of the State Authority is not confirmed, the SPA is still enforceable (*Hassan v. Ismail* [1970] 1 LNS 35; [1970] 1 MLJ 270 (FC)). Learned counsel for the plaintiff also submitted that the cause of action arose when the defendant refused to comply with cl. 3 of the SPA by failing to furnish the issue document of title to the plaintiff's solicitors (*Loo Choo Teng & Anor v. Cheok Swee Lee & Ors* [2000] 2 CLJ 389 (CA); *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211). The request for the title deed was made orally to the defendant after the State Authority consent was obtained. A formal request was made by the plaintiff's solicitors under letter dated 10 August 2009 to the defendant's solicitors. Instead the defendant's solicitors give notice of termination of the SPA.

Doctrine of Laches

[39] The doctrine of laches is founded in equity. It may be pleaded in defence to a claim even if the action is brought within the period of limitation. This equitable relief is preserved under s. 32 of the Limitation Act 1953 which provides that:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence, laches or otherwise.

[40] The doctrine of laches may be successfully raised in defence if it can be shown that by the plaintiff's delay or neglect in prosecuting its claim the plaintiff has acquiesced in the defendant's conduct or has caused the defendant to alter his position to his detriment. In applying the doctrine of laches, the court will consider the conduct of the plaintiff to determine whether he had acquiesced in the state of event of which he complains. The court will also consider the position of the defendant to ascertain

whether the plaintiff's position had in any manner affected or prejudiced the defendant. In particular, the court will consider the length of the delay and the nature of the acts done during the interval.

[41] The doctrine of laches has been succinctly described by the Judicial Committee of the Privy Council in *Lindsay Petroleum Co v. Hurd* (1874) LR 5 PC 221, pp. 239-240 as follows:

> The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, through perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.

[42] In this instance, the defendant was never informed of the plaintiff's applications to the FIC and the State Authority until 7 September 2009. In fact, for some inexplicable reasons, the plaintiff's solicitors failed to forward copies of the SPA to the defendant despite the defendant's solicitors letter dated 14 October 2008. A reminder was issued to the plaintiff's solicitors on 4 December 2008. It was only after nine months later that on 28 July 2009 the plaintiff's solicitors sent a copy of the SPA to the defendant's solicitors. The defendant was only informed of the FIC approval and State Authority consent through the plaintiff's letter to the defendant's solicitors on 7 September 2009.

[43] The conduct of the plaintiff throughout has been tainted with a lack of prudence and discretion. The inordinate length of time the plaintiff took in applying to the FIC; the delay in applying to the State Authority following the FIC approval; not keeping the defendant informed of the applications; not taking any action even

though the State Authority consent had lapsed. Further the plaintiff acquiesced to the apparent so-called errors on the face of the FIC approval and the State Authority consent and took no action to rectify the errors in order to regularise the said approval and consent. Taking all the circumstances aforesaid, the court finds that the defendant has been prejudiced by the plaintiff's conduct, in particular by the plaintiff's delay and neglect in pursuing its rights and interest and prosecuting its claim. It is too late in the day to ask for specific performance. The parties have allowed the SPA to lapse over the period of over eight years; the plaintiff acquiesced in the defendant's conduct and in the state of events of which it now complains. Taking the length of the delay and the nature of the acts done and omissions during the interval, the court finds that this is a proper case for the application of the doctrine of laches against the plaintiff.

Concluding Remarks

[44] On the evidence, the court is satisfied that the plaintiff and the defendant entered into the SPA. The evidence shows that the plaintiff paid the deposit to the plaintiff's solicitors to be held as stakeholders under the SPA. However, the plaintiff has failed to satisfy the burden of introducing evidence to show that it has obtained the necessary FIC approval and State Authority consent. The errors on the face of both documents were unexplained; thereby discounting their evidential value. Any preponderance in favour of the plaintiff had disappeared in the face of this evidential gap. Further, due to the long and inordinate delay and acquiescence in the state of events on the part of the plaintiff, even if the plaintiff's case had been made out, it would not have been equitable for a decree of specific performance to be made in favour of the plaintiff.

[45] In consequence, the plaintiff's case is dismissed with costs of RM15,000.